

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
EASTERN DIVISION

No. 4:95-CR-41-5H
No. 4:03-CV-204-H

DUSHAWN L. GARDNER,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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ORDER

This matter is before the court on petitioner's motions to reconsider this court's order entered November 25, 2013, [D.E. #798], and for relief from judgment pursuant to Rule 60(b)(4) and (6), [D.E. #820].

I. Motion to Reconsider Order Entered November 25, 2013

For insufficient cause shown, petitioner's motion to reconsider, [D.E. #798], is DENIED.

II. Motion for Relief from Judgment

a. Successive Motion to Vacate Under 28 U.S.C. § 2255

Insofar as petitioner attempts to set aside his criminal judgment in case number 4:95-CR-41-5H (E.D.N.C.) based upon Rule 60 of the Federal Rules of Civil Procedure, no such relief may be granted. See Fed.R.Civ.P. 1 (Federal Rules of Civil Procedure only govern procedure in *civil* actions and proceedings); see also United States v. Mosavi, 138 F.3d 1365, 1366 (10th Cir.

2005) (Rule 60(b) of the Federal Rules of Civil Procedure does not provide relief from judgment in a criminal case).

Petitioner's claims, however, except as set forth in Subsection (b) infra are in substance a successive motion to vacate his sentence under 28 U.S.C. § 2255. See Hunt v. Nuth, 57 F.3d 1327 (4th Cir. 1995) (Courts may properly treat Rule 60(b) motion as a successive habeas petition). Because petitioner's motion as it relates to the substantive challenges to his criminal case is a successive § 2255 motion, this court is without jurisdiction to consider it. See 28 U.S.C. § 2255(h). Accordingly, petitioner's motion to vacate is DISMISSED WITHOUT PREJUDICE to his right to apply to the Fourth Circuit for leave to file a successive § 2255 motion.

b. Jurisdiction Over Petitioner's 28 U.S.C. § 2255 Claim

Under a liberal reading of his motion, petitioner also moves this court pursuant to Rule 60(b)(4) and (6) for relief from its order denying petitioner's original motion to vacate under 28 U.S.C. § 2255. Rule 60(b) provides in relevant part that the court may relieve a party from a final order because the judgment is void or for any other reason that justifies relief. Fed.R.Civ.P. 60(b)(4), (6).

Petitioner argues this court was without jurisdiction to decide his motion to vacate under 28 U.S.C. § 2255. Finding

petitioner a prisoner in custody under a sentence of this court at the time of filing his original motion to vacate under 28 U.S.C. § 2255, however, this court properly exercised jurisdiction over petitioner's motion. See 28 U.S.C. § 2255 ("A prisoner in custody under sentence of a court... claiming the right to be released upon the ground that sentence was imposed in violation of the Constitution or laws of the United States... may move the court which imposed the sentence" for relief). Petitioner's claim for relief based on this court's lack of jurisdiction over his motion to vacate under 28 U.S.C. § 2255 is DENIED.

CONCLUSION

For the foregoing reasons, petitioner's:

1. Motion to Reconsider, [D.E. #798], is DENIED; and
2. Motion for Relief from Judgment, [D.E. #820]:
 - a. Is DISMISSED IN PART WITHOUT PREJUDICE to his right to apply to the Fourth Circuit for leave to file a successive § 2255 motion insofar as it is treated herein as a successive motion to vacate under 28 U.S.C. § 2255; and
 - b. DENIED IN PART insofar as it relates to petitioner's challenge to this court's jurisdiction over his original motion to vacate under 28 U.S.C. § 2255.

This order does not raise a substantial issue for appeal concerning the denial of a constitutional right. Accordingly, a certificate of appealability is not issued as to this order.

This 26th day of May 2016.



Malcolm J. Howard
Senior United States District Judge

At Greenville, NC
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